ing the local law was the one to construe the will: *Applegate* v. *Smith*, 31 Mo. 168. The proper rule, therefore, and the one in accord with the analogies and present authorities of this branch of the law would seem to be that it is not at all a question of what law the testator had in view, but that, in construction, the law of the *situs* must govern: Whart. Confl. Laws, sect. 597.

J. P. KIRLIN.

New York.

## RECENT AMERICAN DECISIONS.

*Supreme Judicial Court of Massachusetts.*

### NEW ENGLAND TRUST CO. *v.* EATON.

Where a trustee of a fund which is held for the benefit of a life tenant with remainder over, purchases as an investment bonds at a premium, he may retain out of the interest such sums annually as will restore to the fund, at the maturity of the bonds, exactly what was taken therefrom at the time of purchase. (MORTON, C. J., HOLMES and ALLEN, JJ., dissenting.)

*Hemenway* v. *Hemenway*, 134 Mass. 446, distinguished.

The right of the trustee to retain such sums out of the income may be adjudicated by the probate court upon the settlement of an annual account of the trustee.

THE material facts appear in the opinion of the court, which was delivered by

DEVENS, J.—This is an appeal from a decree affirming a decree of the probate court, by which the account of the New England Trust Company, a trustee holding a fund, the income of which was payable to a tenant for life, with remainder over, was disallowed. The system which had been pursued by the trustee with reference to the investments which it had made in bonds and other promises to pay of the United States government, or of municipal or railroad corporations, due on a certain day, for which premiums had been paid, was to ascertain, by tables in use among bankers and brokers, what was, in fact, the net income arising from these promises—considering the premium actually paid by the investing trustee, which would not be repaid at the maturity of the bond, the rate of interest, the date of payment of the security—and to pay over this net income to the life-tenant; the difference between this net income and the actual rate of interest as received, going to a fund which, at the date of the maturity of the promise, would leave the original capital intact. The decree appealed from directed the

trustee to pay to the life-tenant, as income, the sums thus retained for the purpose of being returned to capital.

Whether the question presented may be heard and adjudicated by the probate court, and then by this court, on appeal, has been doubted. The New England Trust Company is a testamentary trustee, compelled by statute to render its accounts at least once a year to the probate court, of the hearing on which the fullest notice must be given, and the question is one immediately connected with the administration of the trust. The probate court has full power to see and provide that every interest shall be fully represented, and it is to be observed that this court has also, concurrently with the Supreme Judicial Court, full jurisdiction to hear and determine in equity all matters in relation to trusts created by will: P. S., c. 141–143. It had the right to determine whether, upon the account rendered by the trustee, it was its duty to account for the sums it had set aside as a part of the capital of the estate, or as its income, and to hold or pay them over accordingly.

Without discussing those cases in which it has been held that, in settling the accounts of the executors of a will, the relative rights of legatees under a will, and other questions arising under the will in reference thereto, cannot be decided; all of which are not, perhaps, fully reconcilable; they do not affect the question of jurisdiction here involved: *Granger* v. *Basset*, 98 Mass. 469; *Cowdin* v. *Perry*, 11 Pick. 512; *Burbank* v. *Whitney*, 24 Id. 151, first paragraph. Even if we should hold that it was intended that in the administration of an estate the probate court should not pass upon the difficult questions of construction often arising out of wills, but should determine simply the amount of property subject to distribution, it could not affect the present inquiry. The specified object of requesting trustees to render annual accounts, is to ascertain whether the trustee has properly dealt with the trust property. In such a case as the one at bar, the trustee necessarily includes in his account the payments he has made, and describes the investments in which he holds the trust property. If he has paid over to the tenant for life that to which the tenant was not entitled, he should not be allowed therefor; and if, on the other hand, he has transferred to the *corpus* of the fund that which he should not, this should be corrected. Before the hearing in the probate court, and in this court, upon the account of trustees, questions similar to the principal one in the case at bar have here-

tofore been determined. See *Harvard College* v. *Amory*, 9 Pick. 446. It was determined whether a sum received by the trustees of an estate was rightfully paid to the widow of a testator, instead of being reinvested by the trustees as a part of the capital of the trust funds. In *Heard* v. *Eldredge*, 109 Mass. 258, upon the appeal by the life tenant from the decree of the probate court allowing an account by which a certain sum was treated as capital, and not as the income of a trust fund, the decree of the probate court was affirmed. To the same effect are *Bowker* v. *Pierce*, 130 Mass. 262, and *Dodd* v. *Winship*, 133 Id. 359: The case of *Wright* v. *White*, 136 Id. 470, is not inconsistent with the view that, upon the settlement of an account of the trustee, it may be determined whether a sum of money should be treated as the capital or the income of a trust fund. The decree upon such an account deals only with what has been done in the past, although a decree allowing an account of what has been done may afford a guide in ascertaining what will be allowed in the future. What is said on this subject in *Wright* v. *White*, *ubi supra*, is that in a decree allowing an account a direction as to the mode in which a trustee should thereafter manage the trust fund, was not properly a part of the decree allowing an account, and was to be stricken out.

We proceed, then, to consider whether the course pursued by the trustee was correct, and thus whether the account of what he has done is to be allowed. It is the general rule that when investments are made in property of a permanent character, and not in terminable securities, the loss or gain in such investment is that of the *corpus* of the estate. If, for any cause, it be reduced in value, and it becomes necessary to sell it, the sum for which it is sold becomes a new principal, on which the life tenant is to receive the income. In the management of real estate, when permanent improvements are placed thereon, these are a proper charge of the capital, while usual and ordinary repairs, when made, are a deduction from the income: *Parsons* v. *Winslow*, 16 Mass. 361. If a trustee purchases shares in the capital stock in a bank, inasmuch as the remainder-man will receive exactly that which is purchased, the tenant for life should receive the full income thereof undiminished. Such was the course pursued by the trustee in the case at bar, in regard to the bank shares purchased by it. Nor does it become the duty of the trustee to sell such shares, should they appreciate in value after he has invested in them, and pay over to the

tenant for life the amount which they have increased in value. If it becomes necessary to sell such shares in the proper administration of the trust estate, the gain or loss is that of the capital of the estate, and the sum recovered constitutes a new principal.

The tenant for life does not seek any order by which the bonds, the interest on which is here under discussion, are to be sold or the investments changed; nor can it be contended that these securities are not of a class in which trustees may invest, if due care has been used in the selection. The rule "that no investment can be considered safe or can be approved by a probate court or court of equity, except in public securities, however well supported by authorities," says Chief Justice SHAW, "as a rule well established in English courts of equity, is wholly inapplicable and untenable in this country:" *Lovell* v. *Minot*, 20 Pick. 116. While there are now many more public securities than those which existed when this remark was made, investments cannot be confined to them. A loan at a fixed rate of interest, even if secured by the stock of a manufacturing or other business corporation as collateral security, if proper security is taken against fluctuations, is necessarily injudicious: *Brown* v. *French*, 125 Mass. 410. There are many stocks under public supervision—bonds of corporations—where there is sufficient capital to insure their safety, which, with bonds of municipalities, loans secured by mortgage, constitute proper investments. The purchase of the bonds by the trustee appears to have been judiciously made. Substantially all have appreciated in value, and they are of the class of securities contemplated as investments by the statute under which the trustee does its business: St. 1869, c. 182, § 5; St. 1871, c. 142; P. S., c. 116, § 20.

Assuming that the purchase of bonds even at a premium, was safe, prudent, and such as judicious men would make in the conduct of their affairs, which is substantially the rule heretofore laid down, the question arises: Inasmuch as it is certain that the *corpus* of the fund is to be diminished if this investment is permanent, whether the trustee may retain such sums annually as will restore to the fund at its maturity exactly what was taken therefrom at the time of the purchase? This is what the trustee has undertaken to do. If, as suggested in argument, there is any inaccuracy in the calculation by which this result is reached, this is a subordinate matter, to be determined by more accurate accounting should it be required, not necessary now to be discussed. That which is really income

from a bond purchased at a price above par, say 120, and payable in ten years, is not the amount received in interest annually, but that amount deducting therefrom the sum necessary to restore at the end of the ten years the $20 premium. No prudent man would treat as income from his property the whole amount received when there was thus to be a diminution of his principal, amounting at the end of the ten years to this premium, and steadily tending to this during the entire period. To deal with interest thus received as income purely, would, to the extent of the premium, exhaust the capital. The premium paid is no more than an advance from capital, which the remainder-man is entitled to have repaid if he is entitled to receive the capital intact. If, in such a case, the tenant for life should die before the maturity of the bond, and thus the whole advance not then be repaid, he would have paid no more than his just proportion. Unless the premium is to be restored it is not easy to see how investments in bonds having a premium can be made in justice to the remainder-man, whose property (where a bond is kept to maturity) is diminished solely for the benefit of the tenant for life. Into the question how much income an investment, at a premium, in a bond, payable at a fixed future time, produces, the loss of the premium at that time necessarily enters as a factor. The bonds purchased by the trustee have substantially all appreciated in value; and this, to such an extent that if they were now sold, the surplus beyond the sum which would be necessary to restore to the capital all that was paid at the time of purchase by way of premium would enable the trustee to pay the tenant for life the deductions that have heretofore been made in order to repair the principal at the maturity of the bond. The life-tenant, therefore, insists that the trustee should now be ordered to pay to her those sums, as, if a sale were made at this moment, they would not be needed to repair any deficiency in the principal.

The trustee is to manage the fund in his hands, not for the purpose of speculation, "but in regard to the permanent disposition of the fund:" *Harvard College* v. *Armory*, 9 Pick. 461; *Lovell* v. *Minot*, 20 Id. 116. The argument of the tenant for life, that the practice of holding securities until their maturity would deprive him of the "every care and ability in the management of the trust, for which he pays compensation to the trustee," can readily be pressed so far as to sanction the practice of trading and trafficking in trust securities, which would be attended with dangerous results

to the trust fund. Investments carefully and judiciously made are not, as a general rule, to be disturbed. The argument of the tenant asserts that the income obtained for the tenant is less than one-half of that which might be obtained on absolutely safe mortgages. The case affords no evidence of this, nor in this proceeding, which only concerns the account of the trustee, and the amount of his payments to the tenant, could it be settled whether, in this view, the trustee should be ordered to dispose of the securities.

But, if the securities were sold and a larger sum realized than would be necessary to restore to the *corpus* of the estate that which was taken from it when they were purchased, the question would still be whether the appreciation of the securities in market value was the property of the tenant for life or of the remainder-man. There is no ground on which it can be contended to belong to the tenant for life, unless he is also to be made responsible where loss occurs in the purchase and subsequent sale of securities. There cannot be this chance of profit for him unless there is to be a corresponding risk in such transactions. If the rule that when a security is kept to maturity, income is to be paid only to such an extent as shall leave the *corpus* of the estate at that time intact by restoring to it the premium paid at the time of purchase, be just, it is equally just that the gain or loss that occurs by a sale thereof, if for any cause one shall become necessary while it is running, should be that of the *corpus* of the fund. The estate of the tenant for life will be unaffected thereby, except so far as it may be altered when a change is made in securities by the increase or diminution of the sum to be re-invested. To expose the estate of the tenant for life to any risk beyond what is involved iu this, and, because there may be a possible chance for gain under some circumstances by changes in investments; to subject it to the loss which occurs, when, for any cause, it becomes necessary to sell, at a diminished price, securities purchased for the trust estate, would be to defeat the object for which tenancies for life are in most cases created.

In *Parsons* v. *Winslow*, *ubi supra*, there had been a loss to the trust estate by the defalcation of the trustee, whose successor had been able to recover from him in value only a portion of the property originally intrusted to him. It was held that the diminished fund thus received would constitute a new principal, and that the loss would thus "be apportioned in the same manner as if it had arisen from the fall in the price or value of any public stocks or of

any land in which the fund should have been invested according to the provisions of the will." It is said by Mr. Justice JACKSON: "It would be unjust and contrary to the manifest intent of the testator, if the tenant for life, on the one hand, should continue to receive the whole amount of the interest on the original fund after the principal had been thus reduced; or if, on the other hand, the income should be applied to replace the principal. In the one case, the tenant for life would be left for an indefinite period without any support or benefit from the intended bounty of the testator; and in the other, the remainder-man might loose all that was intended for him."

It has been suggested that a suspense account might be kept by the trustee, to which sums, such as have in the case at bar been retained, might be carried; and if hereafter the bonds should be sold before maturity at an advance, the life-tenant would be entitled to receive therefrom all that was not required to restore the capital originally invested. This suggestion is based upon the theory that any possible profit made by the sale of securities belongs to the tenant for life, and still involves the idea that he must bear the possible loss. We cannot consider this, except so far as his estate is affected by the increase or diminution of the sum to be reinvested. Such a suggestion would require, as a corresponding duty, that when a bond was depreciating in value there should be retained from the life-tenant's income such sums as would be necessary to repair the loss to the capital of the estate by such depreciation, should it be sold before maturity.

There can ordinarily be no better test of the income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainder-man, than the interest which can be received from a bond which sells above par, and is payable at the termination of a fixed term, deducting from such interest as it becomes due such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should have been made, it has been because a change in the rates of interest, or some similar cause, has altered market values. There would be no reason to suppose that such a bond could be sold, and the amount received reinvested at any higher rate of interest, unless at the sacrifice of some safeguard in the investment. The investments of trust property should be made with a view to permanency, and

not in any spirit of speculation; nor should changes be made except after much inquiry and circumspection, and ordinarily with an immediate and advantageous reinvestment in contemplation. In making such changes the trustees are not entitled so to exercise their authority as to vary or affect the relative rights of the *cestuis que trust:* Hill on Trusts 483.

The only case in this country which we have found, or to which we have been referred, deciding the question we have considered, is *Farwell* v. *Tweddle*, 10 Abb. N. C. 94, in which it was held that a course similar to that pursued by the trustee in this case was correct and proper. Not much assistance was to be expected from the English cases, as until 22 & 23 Vict. c. 35, § 32, authorizing investments in East India stock, only one security, the 3 per cent. consols, bank stock, was there recognised as proper for trust-estates. An investment in the 3 per cents, which it is not contemplated will ever be paid, and the holders of which have been considered as perpetual annuitants, has been deemed the only safe investment, and peculiarly adapted for the purpose, as, until a recent period, they have been below par. The principle is well established by all the English cases that the *corpus* of the trust capital is to be kept intact, so that the remainder-man may thus receive it, while, in justice to the life-tenant, it must be kept in income-producing property. When the testator makes a general gift of his estate to, or in trust for, a person for life, with remainder over, so much of the property as consists of leaseholds, terminable annuities, or other interests of a perishable nature, must be converted and invested in these permanent securities. As they are permanent, whether purchased above or below par, the life-tenant receives the full income, the remainder-man receives undiminished that which has been purchased, and no adjustment of the relative rights of the *cestuis que trustent* has been necessary. It is contemplated that there may be specific gifts of terminable or perishable securities which shall show an intention on the part of the testator that the life-tenant may exhaust or consume them, in which case reinvestment would not be required, nor indeed proper. In the absence of these, if, in contradiction of the general rule, the trustees suffer the tenant for life to receive the whole income arising from such securities, he will be decreed to refund what he may have received, over and above what he would have received if the conversion had been duly made and the proceeds invested in the 3 per cents. This difference is treated as capital to be invested

for the benefit of all parties entitled, and the tenant for life is bound to make it good in the first instance. On his failure, the trustees are responsible therefor: Hill on Trusts, sect. 386, and Perry on Trusts, sect. 547.

The same principles have been applied since investments of trust funds were, by the statute of 22 & 23 Vict. c. 35, permitted to be made in East India stock, which is a security that, as well as certain other stocks named, may be redeemed. The courts have constantly refused to allow any investments to be made therein, unless there were peculiar reasons for favoring the life-tenant, or at the request and on the application of the settler of the trust: *Equitable Rev. Int. Soc.* v. *Fuller*, 1 Johns. & H. 379; *Hemenway* v. *Hemenway*, 134 Mass. 446. In such cases the direction has sometimes been, that the investment should not be made unless the stock could be purchased at par: *Waite* v. *Littlewood*, 41 L. J. (N. S.), ch. 636. One reason given in *Cockburn* v. *Peel*, 5 De Gex, F. & J. 170, for refusing to permit a purchase of East India stock, was that it must be purchased at an advance, and that there was no provision in the act for any sinking fund by which the deficiency made could be supplied.

In *Hume* v. *Richardson*, 4 De Gex, F. & J. 29, it was held that for the period between the death of the testator and the passing of the statutes 22 & 23 Vict. c. 35, the life-tenant was entitled only to such income as she would have received had the stock been converted and invested in consols; and that although, after the passage of this statute, she was entitled to the whole income, yet the trustees were only justifiable in keeping the East India stock until a suitable investment could be made in land, in which, by the will, the trustees were directed to invest.

*Brown* v. *Gellatly*, L. R., 2 Ch. 751, decides no more on this subject than that when the testator authorizes investments as permanent, which would otherwise be unauthorized, the life tenant has the full income. This authority, given by the will, indicated a preference of the life-tenant to this extent, which took the case out of the ordinary rule. "I understand," says the chancellor, "the words of the will as amounting to the constitution by the testator of a larger class of authorized securities than the court would have approved of, and the court has merely to follow his directions, and treat the income accordingly as being the income of authorized securities." Other securities not coming within this class were

ordered by the chancellor to be converted as soon as possible, and until this could be done, the life-tenant would be entitled thereon "to the dividends on so much three per cent. stock as would have been produced by the conversion and investment of the property at the end of the year."

The method in which the English courts deal with leasehold estates, a common species of terminable securities not known in the same form in the United States, when they are settled in trust for life, with remainders over, under such circumstances that the settler must have regarded them as continuing interests for all the beneficiaries of the trust, including the remainder-man, is strictly analogous to that which the trustee in the case at bar has pursued. These estates, which are terminable on a life or lives, or at the end of fixed terms, are renewable, sometimes by express contract, and sometimes by custom which has been recognised as legal, upon the payment of certain fines and other expenses. It is held to be the duty of the trustees to preserve the leasehold estates by renewing, at the usual periods, for the benefit of the parties in remainder. In the absence of other direction by the settler, the fine, &c., for renewal is to be paid out of the rents and profits in the proportion in which the *cestuis que trust* enjoy the estate. If a renewal becomes impracticable, the tenant for life does not reap the whole advantage of non-payment of the sum properly due for renewal, if there was an express trust for renewal. His interest, minus the expenses of the renewal, is all that is given him, and his proportion of the amount fairly to be paid for renewal is still a proper charge on the leasehold estate for the benefit of the remainder. When the leasehold estate is for years, the amount to be paid is readily ascertainable by the proportion which the tenant for life enjoys of the leasehold estate; and when it is for lives, and there is no express fund created for the renewal, it is more difficult, and the court has sanctioned the plan of insuring the lives of the *cestuis que vie* to an amount sufficient to cover the usual expense of renewing on the dropping of a life: Hill on Trusts 436. While the cases on this subject are complicated by the express provisions made in the settlements, and appear in some respects confused, they establish fully the position that, in the absence of direction otherwise, the property received is to be turned over by the tenant for life as he received it, and that his income is not the full rent and profit, but those after deducting therefrom, as accurately as it can be ascer-

tained, his just proportion of the expense of maintaining the security by renewal of the lease.

The tenants for life rely much upon *Hemenway* v. *Hemenway*, 134 Mass. 446. This was a bill in equity by which was brought before us the whole management of a large estate, in which very ample discretionary powers had been given to trustees. The testator had left, subject to the trust, bonds payable at a fixed period. As between the tenant for life and the remainder-man, it was decreed that the trustees, by the authority conferred by the clause of the will "to hold the said property as they may receive the same, or at their discretion to sell the same," were entitled to continue their investments as such, and to retain these bonds until they were paid off, and that, "the whole net income of the investments thus authorized must go to the tenants for life, by the terms of the will." There was also an investment made by the trustees in certain bonds, having nearly eighteen years to run, on which a small premium had been paid. The case was decided upon its own peculiar circumstances, which, so far as disclosed, were held to show no special reason why the tenant for life should not receive the interest paid on the bonds. The investment constituted "a very small proportion of a large estate," and Mr. Justice HOLMES remarks: "We have no reason to doubt that, taking the whole administration of the trust into account, the balance has been evenly held between the two parties, and the relation between the remainder-man and the life-tenants is such that there is less call than there might be in some other cases for treating the life-tenant with great strictness."

It certainly was not held that the trustee might not, for the trust estate, purchase, under some circumstances, at a premium, bonds payable at a fixed time, and, exercising his discretion honestly and for the purpose of dealing fairly with both parties, might not reserve, as received, some portion of that paid as interest, sufficient at the end of the period to restore the premium to the capital, by the loss of which it would otherwise be depleted.

Upon the account rendered by the trustee in the case at bar, as heretofore said, the question whether, by virtue of our supervision over trusts, the trustee should be ordered to change his investments, is not sought to be brought before us. Upon these, as they exist, the deduction from the full interest reserved to restore the premium at the end of the term, was properly made. It is only thus that

the property can be turned over to the remainder-man undiminished. If the estate of the tenant for life terminates before the bond expires, the cost of effacing the premium will be borne in the right proportion by the respective *cestuis que trust.*

In the opinion of the majority of the court, the entry should be, "Decree reversed."

HOLMES, J. (*dissenting*).—If the opinion of the majority rests on the ground that, so far as appears, the trustees might have made their investments with the intent to keep them until the trust expired or the bonds matured, and in the exercise of its discretion as a business manager, in view of the particular circumstances of the case, thought it necessary to retain a fund in suspense against a probable loss of premium, speaking for myself alone, I should have been disposed to acquiesce in that opinion. But from the main line of reasoning actually adopted, I must dissent, upon grounds both of principle and authority.

Shortly stated, I understand that reasoning to be this: That if a bond is bought at a premium, it must be assumed that the premium is paid, for the single reason that the rate of interest on the bond is higher than the market rate, because it must be assumed that the investment is absolutely safe; that, therefore, the analogy of wasting investments, such as leaseholds, applies, and that an annual deduction from interest is proper.

So far, this is precisely the argument that was pressed upon us with much force in *Hemenway* v. *Hemenway*, and which was rejected after the gravest deliberation. A great part of the opinion was devoted to answering it, and it still seems to me that the discussion was necessary to the decision of the case. *Hemenway* v. *Hemenway*, did not bring before us the whole administration of the estate, but certain specific questions, one of which was whether the interest should make good the premium paid by trustees for bonds purchased by them above par. If the rule now adopted had been recognised, it would have been unnecessary and improper to look beyond the particular bonds to the rest of the account. It was because that rule was repudiated that it was said, and deliberately said, that nothing showed that the premium was paid for interest above the market rate, and that the whole administration of the trust might be considered. The latter principle is not the law in jurisdictions when authorized investments are limited in number, as in New York, but each investment is dealt with sepa-

rately. The only reason for departing from the precedents elsewhere was, that in the latitude allowed trustees in this Commonwealth, it was thought impossible to assume that premiums were paid in respect of interest alone. I think, therefore, that the opinion of the majority is opposed to one of the points directly decided in *Hemenway* v. *Hemenway*, as it certainly is to the whole course of reasoning in that case, and I am confirmed in my opinion by the fact that two other of the four surviving justices who took part in the decision are of the same mind. I must suppose that *Hemenway* v. *Hemenway* has been accepted by trustees as expressing the settled opinion of the court. I cannot foresee the extent or nature of the evil that may follow from our abandoning what has been acted on as law. But I should be most unwilling to overrule a decision which I supposed to have been accepted as a guide in dealing with property, even if I thought it wrong. I do not, however, think either the decision or the reasoning in *Hemenway* v. *Hemenway* wrong, and I refer to that case for what I do not deem it necessary to repeat here.

But I understand the opinion of the majority not to stop with overruling *Hemenway* v. *Hemenway*. In this case the bonds thus far have not depreciated, but have risen, in value. No part of the premium has been lost as yet; but the argument is either that it is to be presumed that the bonds will be kept until the premium is lost, or else that the approach to maturity is a constantly acting cause which depreciates the bond so much each year with mathematical certainty, and that even if the depreciation is disguised by a more powerful motion the other way, it must be allowed for, because the rise in value belongs wholly to the *corpus*, and would have been so much greater but for the counteracting influence. I think I fully appreciate the logical force of this argument, but it appears to me to illustrate the danger of relying on logic when your premises are fictitious. The necessary premise for casting the whole burden of repaying premiums upon interest is, that the premium is paid solely for interest above the market rate. If that premise is a fiction, as I think it is, and if considerations of policy are held, nevertheless, to justify its adoption, at least the conclusion to be drawn from it should be guarded and restrained by considerations of a similar nature. I can hardly think that if the trust had been terminated, or the bonds sold, at the date of the account, when the coupons had actually gained by the investment, the sums

retained from interest would be paid over to the remainder-man. Yet that conclusion would follow from the reasoning. I think, in other words, that the question of holding the balance even between tenant for life and remainder-man is a problem so dependent on the particular facts, and so complex, that while we cannot hope to solve it with perfect accuracy, every one would feel that to cut the knot with a formula, in the case I have supposed, would be an unnecessary abandonment of the discriminations within our power, and, as a practical judgment, would be as likely to work injustice as justice.

If I am right so far, what difference can it make that the trustee has not sold? Whether it is or is not true, as is said in *Hemenway* v. *Hemenway*, that a determination not to sell, if a sale is possible, stands on much the same footing as a purchase, I apprehend that if a trustee, having the usual powers, sells and reinvests twenty times in as many days, he is not *ipso facto* guilty of a breach of trust, and that if the reinvestments are proper and profitable his conduct would not be open to animadversion. On this point the English books can give us no light. At all events this trustee might sell now if it saw fit. On what ground is the determination of the trustee not to sell—a determination which the court cannot revise—to change the relative rights of the *cestuis que trust?*

Let us look a little further into the rule adopted. Suppose a sale to have taken place, and other bonds to have been bought at a price above par. The trustee will, of course, compute the rate of interest to be received by the tenant for life in the future, by deducting the annual sums necessary to replace the new premium paid. But there is no particular sanctity in the rate which happened to prevail at the moment of purchase; still less in the rate artificially determined by the premium paid. If there has been no sale, but the market price of the bonds has risen, *ex hypothesis* the rate of interest is conclusively proved to have fallen, because the fall in the current rate of interest is the only recognised ground for a rise in price. Why is not the remainder-man entitled to have a new computation started on that footing? Why is not the tenant for life entitled to have the reservation diminished if the rate of interest rises? And pushing the principle to its logical result, why is not the trustee bound to follow the fluctuations of the market from day to day, attributing them all to the fluctuations of interest, as he is bound to do?

I now recur to the premises of the argument which I am opposing.

I repeat what was said in *Hemenway* v. *Hemenway*, that I do not see how we can start with the assumption that all proper investments are absolutely safe, when the leading case in this state is to the very point that an investment may be unsafe, and yet justifiable: *Lovell* v. *Minot*, 20 Pick. 116. But the assumption appears to me to be inconsistent with facts which we must notice, and to lead to the conclusion not yet mentioned which we could not accept. Within a few years the first mortgage 4 per cent. bonds of a flourishing railroad have sold at 85, while at the same time United States 4 per cents stood at 120 or more, and city 4 per cents of a high rank stood at about par. The differences were not to be accounted for by the difference of time which the bonds had to run, or by exemption from taxation. I should be surprised to learn that either bond was not a proper investment. If they all were proper investments, the difference in price could not be referred to difference in interest.

Again, if the fiction of safety be adopted, I still do not see why it does not follow that if a bond is bought below par the tenant for life is equally entitled to an annual increment on the interest received by him as the bond gradually approaches maturity. This was argued in *Hemenway* v. *Hemenway*, but I must believe that such a doctrine would disconcert trustees not a little. Of course it would call for sales of capital from time to time to produce funds for the tenant for life beyond the amount received on the bonds. There is a well-known bond which was purchased by trustees a few years ago at 50 per cent, and which now stands at 120 or over. How is a case like that to be dealt with?

If it be said that the consequences suggested follow only upon an attempt to carry logic too far, and that they are to be controlled by practical judgment, I agree. But I think that the same thing ought to be true of the step now taken, as I have said already. If we are to start with a fiction, and then apply logic, I think these results follow. If we are to use our judgment, I do not see why we should not use it at every step, and I believe that, to make the tables referred to the universal arbiter between tenant for life and remainder-man, is not so near an approach to justice as we may hope to make. I am much more disposed to regard trustees as a sort of domestic tribunal *ex necessitate* between the parties, subject to the control of the courts in case of a want of good faith or reasonable judgment.

Finally, I must repeat what was said in *Hemenway* v. *Hemen-*

*way*, after an elaborate examination of the English books, that, in my opinion, the English cases do not apply the principle of wasting investment to premiums on authorized permanent investments. But, even if they did, I should consider that, in view of the latitude of investment allowed in Massachusetts and the great fluctuations of American securities, it would be undesirable to accept that principle at present, and still more so to adopt the simple device of the tables as the means of working out that principle.

I express no opinion upon the question of jurisdiction, which I have not thought it necessary to examine, as both parties desire to have the case dealt with upon its merits now.

I am authorized to state that the Chief Justice and Mr. Justice CHARLES ALLEN concur in the views which I have expressed.

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*United States Circuit Court, W. D. Michigan.*

## MINERAL RANGE RAILROAD CO. *v.* DETROIT & LAKE SUPERIOR COPPER CO.

A state statute provided that proceedings for the condemnation of land for railway purposes should be instituted in the probate court of the proper county; that the necessity for taking the lands, and their value, should be determined by commissioners or a jury selected by such court; and that such proceedings should only be subject to review by the Supreme Court. Under this statute a railroad company petitioned the probate court for the condemnation of defendant's lands. The defendant answered the petition, and demanded a removal of the case to the federal court. *Held*, that the case was removable directly from the probate court.

It is no objection to the jurisdiction of the federal court in such cases that it involves the exercise of the right of eminent domain.

ON motion to remand.

On the 14th of September, 1885, the Mineral Range Railroad Company filed its petition in the probate court for the county of Houghton, for the condemnation of certain lands owned by the defendant in the village of Hancock, for the purpose of constructing a branch of its road across these lands from Houghton to Hancock. The defendant shortly thereafter answered the petition, and upon the same day filed its petition in the probate court for the removal of the cause to this court, upon the ground that it was a citizen of the state of Connecticut. The removal was ordered, and a transcript of the record immediately filed in this court. The railroad company thereupon moved for the appointment of three commissioners